EILEEN R. RIDLEY, CA Bar No. 151735
eridley@foley.com
MICHAEL A. NARANJO, CA Bar No. 221449
mnaranjo@foley.com
ALAN R. OUELLETTE, CA Bar No. 272745
aouellette@foley.com
FOLEY & LARDNER LLP
555 CALIFORNIA STREET
SUITE 1700
SAN FRANCISCO, CA 94104-1520
TELEPHONE: 415.434.4484
FACSIMILE: 415.434.4507

Attorneys for the Anthem Defendants[1]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DUAL DIAGNOSIS TREATMENT CENTER, INC., a California corporation, et al.,

Plaintiffs,

vs.

BLUE CROSS OF CALIFORNIA, dba ANTHEM BLUE CROSS, et al.,

Defendants.

Case No. SACV 15-00736 DOC (DFMx)

REPLY BRIEF IN SUPPORT OF DEFENDANTS' OMNIBUS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: June 12, 2017
Time: 8:30 a.m.
Location: Courtroom 9D

Judge: Honorable David O. Carter

Complaint Filed: May 8, 2015

[1] Exhibit A, attached hereto, identifies the individual defendants that are referred to collectively herein as the "Anthem Defendants." Exhibit B identifies the defendants joining in the Reply Brief, referred to collectively as "Defendants" in this Motion.

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I. INTRODUCTION

Despite this Court's express instructions in its prior Omnibus Order, the Second Amended Complaint (the "SAC") filed by Plaintiffs Dual Diagnosis Treatment Center, Inc., *et al*. (collectively, "Plaintiffs") against Defendants does next to nothing to address the vague pleading and legal insufficiency of Plaintiffs' claims.

The SAC fails to plead with particularity the substance of, or the circumstances surrounding, the Defendants' alleged misrepresentations to Plaintiffs. Plaintiffs' claims under ERISA and the California Business and Professions Code § 17200 (the "UCL") therefore fail. Plaintiffs also fundamentally misunderstand the nature of the equitable remedies available under ERISA. The Ninth Circuit, like the Second Circuit in *Amara*, holds that reformation requires fraudulent ***inducement*** in obtaining assent. Plaintiffs have not pled any fraud in the inducement. Plaintiffs' equitable estoppel theory fares no better. The Ninth Circuit holds that estoppel may not be used to vary the written terms of plan documents. Thus, Plaintiffs may not seize upon purported oral representations contradicting the plans' anti-assignment provisions ("AAPs") to estop their enforcement. Similarly, Plaintiffs' various state law claims are insufficient to give Defendants fair notice of Plaintiffs' grounds for relief and are inadequately pleaded.

For the reasons detailed in the opening omnibus brief and herein, this Court should dismiss Plaintiffs' claims in the SAC in their entirety and with prejudice.

II. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED WITH PREJUDICE

A. Plaintiffs' First and Second Claims Fail Where They Cannot Clearly Allege They Are Owed Unpaid Benefits.

In its May 22, 2017 Minute Order, this Court ordered Plaintiffs to list the amount of benefits they allege are currently owed as a result of the treatment of each patient in the SAC. [Dkt. 1148.] To the extent Plaintiffs have failed to clearly allege as to any patient that they are owed *benefits* – excluding any extra-contractual damages they contend they are owed[2] – their First and Second Claims should be dismissed with

[2] The Opposition concedes that Plaintiffs do not seek extra-contractual damages under

prejudice. *See Cruzeta v. Sony Electronics, Inc.*, No. 12-cv-1430-L-BLM, 2013 WL 12098756, at *7 (S.D. Cal. Dec. 10, 2013) (dismissing § 502(a)(1)(B) claims without leave to amend where they seek damages rather than benefits).

B. Plaintiffs Fail To Satisfy Rule 9(b)'s Particularity Requirement For Their Second And Third Claim.

Plaintiffs argue that their Second Claim under ERISA and Third Claim for alleged violations of Business and Professions Code § 17200 satisfy Rule 9(b) because the "Patient Appendix provides a detailed account for each Former Patient." [Opp. at 3:18-19.] Plaintiffs' argument fails on several independent grounds. The crux of Plaintiffs' argument is that a complaint need only plead the "circumstances constituting fraud" such that the defendant can "prepare an adequate answer from the allegations." [*See* Opp. at 4:9-11.] Well-settled Ninth Circuit case law applying Rule 9(b) is to the contrary. If a complaint includes allegations of fraud, Rule 9(b) "requires more specificity including an account of the 'time, place, and ***specific content of the false representations*** as well as the ***identities of the parties to the misrepresentations***.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (emphasis added); *see also Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (requiring specificity in pleading substance of misrepresentation). The SAC does not allege the requisite "specific content" of the false representation. *Swartz*, 476 F.3d at 764. All Plaintiffs assert is that "Sovereign or its agents learned from" an insurer that a patient's "benefits were assignable." [*See, e.g.*, SAC ¶ 317(d) (alleging what Plaintiff entity or its agent "learned," not what a specific Defendant represented) .] This says nothing about the "specific content" of the alleged misrepresentation. It only alleges Plaintiffs' subjective understanding.

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their ERISA benefit claims. [Opp. at 3, n.2.] The ERISA Welfare Plan Defendants are not subject to either of Plaintiffs' other claims. Thus, to the extent Plaintiffs allege they are "owed" any extra-contractual damages arising from the treatment of any patient without identifying whether or not this includes any outstanding ERISA benefits payments, the Welfare Plan Defendants will be unable to determine whether Plaintiffs have even alleged unpaid benefits for services to those Defendants' beneficiaries. That is, the Defendants will not know if Plaintiffs have stated an ERISA benefits claim against them. [*See* Order at 36.]

Plaintiffs' reliance on *Moore* is entirely misplaced. Contrary to Plaintiffs' selective reading of the decision, *Moore* confirms the conclusion that the SAC is insufficiently pleaded. In *Moore*, the Ninth Circuit upheld the district court's denial of leave to amend in a securities fraud case because, among other things, the prospectus was "not specifically identified as to content…" 885 F.2d at 540. Although the Rule 9(b) standard may be relaxed in limited instances "as to matters within the opposing party's knowledge," the *Moore* court noted that this does not excuse the requirement of pleading allegations that "include the misrepresentations themselves ***with particularity***." *See id.* (emphasis added); *cf.* [Opp. at 5:9-20.]. Like the *Moore* plaintiffs, Plaintiffs have repeatedly failed to plead the specific content of the alleged misrepresentation. This warrants dismissal of their Second and Third Claims with prejudice.

Plaintiffs also fail to allege which specific Plaintiff entity communicated with Defendants. *See Moore*, 885 F.2d at 540 (affirming denial of leave to amend because, *inter alia*, the complaint "[did] not specify ***which plaintiff*** received which prospectus, or ***which (plaintiffs)*** made purchases through the stockbroker defendants, or which securities the investors allegedly purchased.") (emphasis added). Nor do Plaintiffs allege whether a Plaintiff or a Plaintiff's "agent" communicated with Defendants. [*See, e.g.*, SAC ¶ 317(d).] The Opposition does not even address this defect.[3] *See Swartz*, 476 F.3d at 764 (holding that fraud pleading requires allegations of the "identities of the parties to the misrepresentations."). Because the Opposition Brief concedes that Plaintiffs cannot plead their claims with greater specificity [*see* Opp. at 5:19-20.], and these averments fail to satisfy Rule 9(b) in spite of the Court's instructions [*see* Order at 18-19, n.9], the dismissal should be with prejudice.

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[3] The "relaxed" Rule 9(b) standard again does not apply in this scenario. Which Plaintiff entities and which of their agents supposedly communicated with Defendants are matters within Plaintiffs' knowledge.

C. Plaintiffs' Second Claim Under ERISA Should Be Dismissed For Failure To State A Claim.

1. As A Remedy, Reformation Addresses Problems In The Inducement Of Assent, Not Post Hoc Statements Made After Formation Of A Contract.

Plaintiffs contend that their claim for reformation under ERISA is legally sufficient because after-the-fact misrepresentations can serve as a basis for modifying benefits plan terms. [Opp. at 10:23.] In support of this argument, Plaintiffs rely on the Supreme Court's decision in *Amara* and the post-remand decision in the Second Circuit. [*See* Opp. at 9-11.] Neither supports Plaintiffs' reformation claim.

First, Plaintiffs overlook the holdings of two binding post-*Amara* Ninth Circuit decisions, both of which provide that reformation based on fraud requires ***inducement*** of a contract based on wrongful conduct or misrepresentations. [*See* Omnibus MTD at 11-13]; *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 962 (9th Cir. 2014); *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165 (9th Cir. 2012). That is, reformation under ERISA is available only where mistake or fraud improperly influence the creation of the contract itself. *See Gabriel*, 773 F.3d at 962 (rejecting reformation based on mistake because "the Fund's mistaken administrative records did not reflect the parties' true intent ***in entering into the Plan***," and rejecting reformation based on fraud because Plaintiff did "not allege that the Plan ***was procured by wrongful conduct***") (emphasis added) (internal quotation marks omitted); *Skinner*, 673 F.3d at 1166 (holding that a court may reform a contract when, *inter alia*, that "party's assent ***was induced*** by the other party's misrepresentations as to the terms or effect of the contract.") (emphasis added). As this Court observed in its Omnibus Order, Plaintiffs' claim for reformation must allege that "because of mistake or fraud, the plan terms do not reflect those the sponsor ***assented to or intended to impose***." [Order at 19 n.9 (emphasis added).] After-the-fact statements cannot give rise to a reformation claim under ERISA.

Second, Plaintiffs' citation to *Amara* confirms that reformation based on fraud requires pleading fraud in the inducement of a contract. Plaintiffs assert that in *Amara*,

reformation was available as a remedy even though the actual plan document was not wrongfully procured by fraud. [*See* Opp. at 10:20-21.] This misreads the facts of *Amara*. There, the defendant employer, CIGNA, provided "***initial*** descriptions of its new plan" to employees that were misleading. 563 U.S. 421, 428 (2011) (emphasis added). Thus, contrary to Plaintiffs' assertion, the misrepresentation did not come after the fact. [Opp. at 10:23.] Instead, the misrepresentations found in the newsletter distributed by CIGNA preceded substantive changes to the retirement program. *See Amara*, 563 U.S. at 428.[4]

Third, the post-remand line of *Amara* cases similarly holds that reformation under ERISA is appropriate if the contract itself does not reflect the intent of the contracting parties; they do not authorize reformation premised on alleged misrepresentations made after contract formation. *See Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 252 (D. Conn. 2012) ("Equity courts traditionally had the power to reform contracts that ***failed to express the agreement of the parties***, owing either to mutual mistake or to the fraud of one party and the mistake of the other."). After *Amara* was appealed again, the Second Circuit noted the following about reformation: "[U]nder contract law, when a party ***induces assent*** to a writing by fraud or intentional misrepresentation, a court may reform that writing to reflect the terms as represented to the innocent party." *Amara v. CIGNA Corp.*, 775 F.3d 510, 524 (2d Cir. 2014) (emphasis added) (citing Rest. (Second) of Contracts § 166). To the extent the Second Circuit analyzed CIGNA's misrepresentations, it did so because they "constituted evidence of CIGNA's fraud and evidence regarding what CIGNA's employees understood ***the transition*** from Part A to Part B to entail." *Id*. at 529 (emphasis added). In other words, CIGNA, in enacting new plan terms, had allegedly used misleading statements to obtain its employees' assent. Post hoc claims about their benefits, by contrast, did not serve as a basis for reformation.[5]

[4] *See also id*. at 431 ("The District Court concluded, as a matter of law, that CIGNA's representations (and omissions) about the plan, made between November 1997 (***when it announced the plan***) and December 1998 (***when it put the plan into effect***)" violated ERISA) (emphasis added)).

[5] Other courts agree. *See Bush v. Liberty Life Assurance Co. of Boston*, 77 F. Supp. 3d 900, 909 (N.D. Cal. 2015) (holding that "[s]tatements made by fiduciaries that are contrary to clear and express terms of the plan are an insufficient basis for reformation.");

Because Plaintiffs have not pleaded any fraud in the inducement of assent, their claim for reformation under ERISA fails as a matter of law and should be dismissed with prejudice. [*See* SAC ¶ 287.]

2. Plaintiffs Do Not Dispute That Their Reformation Claim Based On Fraud Is Implausible.

Plaintiffs' claim for reformation under ERISA should be dismissed on the independent ground that they have not pleaded a "plausible inference of fraud." *See Parsons v. Bd. of Trs. of Nev. Resort Ass'n-I.A.T.S.E. Local 702 Ret. Plan*, No. 2:12-cv-00299-LDG (VCF), 2012 WL 3319742, at *5 (D. Nev. Aug. 13, 2012) (citing *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064 (9th Cir. 2005)). As the *Parsons* court observed, a mere discrepancy between the plan document and later representations is not evidence of "fraudulent inducement" for reformation. *Id*. Absent allegations of "trickery, hiding facts, active concealment, or active misrepresentation," a claim for reformation under ERISA is insufficient. *Id*. Because Plaintiffs do not dispute the implausibility of their fraud allegations for the reasons set forth in the Omnibus Motion [*see* Omnibus MTD at 12:10-13:11], their reformation claim should be dismissed with prejudice.

3. Plaintiffs' Authorities Do Not Permit An Estoppel Claim To Contradict Written Plan Terms.

Plaintiffs contend that equitable estoppel under ERISA "*overrides* conflicting plan terms." [Opp. at 13:4-5 (emphasis in original).] In support of this proposition, Plaintiffs cite to three out-of-circuit cases and *Amara*. But this ignores the explicit holding of pre- and post-*Amara* Ninth Circuit precedent: as a matter of law, estoppel may not be used to modify the unambiguous language of plan documents.[6] Because the AAPs state in no uncertain terms that benefits are non-assignable, Plaintiffs may not use estoppel as an escape hatch to avoid their application.

Perry v. Int'l Bhd. of Teamsters, 118 F. Supp. 3d 1, 6 (D.D.C. 2015) (citing *Skinner*'s holding in which reformation requires a party's assent induced by misrepresentation).

[6] *See Gabriel*, 773 F.3d at 959; *Greany v. W. Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992); *Renfro v. Funky Door Long Term Disability Plan*, 686 F.3d 1044, 1054 (9th Cir. 2012).

None of Plaintiffs' out-of-circuit cases hold that estoppel may alter, let alone "override," unambiguous plan terms. [*See* Opp. at 13:5-11.] Each case is inapposite because none address the merits of the equitable estoppel claim. Instead, each case merely reiterates *Amara*'s dictum that equitable estoppel is a potential remedy for a § 502(a)(3) claim.[7] Nor does *Amara* hold that equitable estoppel can contravene the literal terms of a benefit plan. [*See* Opp. at 12-13:4.] Post-*Amara* Ninth Circuit case law already states a necessary condition of applying equitable estoppel under ERISA: estoppel may not vary written plan terms. *See, e.g.*, *Gabriel*, 773 F.3d at 959. Nowhere in *Amara* does the Court address the pleading requirements for a federal ERISA estoppel claim. *See* 563 U.S. at 443 (identifying only one element of estoppel: detrimental reliance); *id*. at 444 (noting that the Court was "not asked about the other prerequisites for relief"). Therefore, *Amara*'s general discussion about potential equitable remedies such as estoppel does not allow Plaintiffs to excise valid AAPs.

In short, none of the authorities relied on by Plaintiffs authorize a plaintiff to use equitable estoppel to redraft the explicit and unambiguous terms of benefit plans. [*See* Omnibus MTD at 14.] To the contrary, Ninth Circuit authority forecloses Plaintiffs' theory of equitable estoppel in which statements made by the plans' purported "agents" can serve as a legal basis to nullify valid AAPs. [*See* SAC ¶ 288.]

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[7] *See McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 182-83 (4th Cir. 2012) (overturning district court's decision that precluded equitable estoppel as relief under § 502(a)(3)); *id.* at 182 (stating that "whether equitable estoppel is an appropriate remedy in the circumstances of this case are questions appropriately resolved in the first instance before the district court."); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 453 (5th Cir. 2013) (stating that "[b]ecause relief is available under the surcharge doctrine under *Amara*, we do not address the equitable estoppel claim. The district court is free to consider that claim on remand."); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 723 (8th Cir. 2014) (holding that "without resolving [plaintiff's] claim on the merits, we find that this alleged wrong can survive a Rule 12(b)(6) motion because relief could be granted under § 502(a)(3)'s catchall provision using the traditional equitable estoppel theory discussed in *Amara*"). In fact, the Fourth Circuit in *McCravy* cited *Coleman v. Nationwide Life. Ins. Co.*, 969 F.2d 54 (4th Cir. 1992) as current law. 690 F.3d at 182, n.4. *Coleman* provides that "[e]quitable estoppel principles, whether denominated as state or federal common law, have not been permitted to vary the written terms of a plan." 969 F.2d at 59.

4. Plaintiffs Fail To Distinguish *Gabriel* and *Skinner*.

Gabriel and *Skinner* bar Plaintiffs' claims for reformation and estoppel as a matter of law. Plaintiffs incorrectly contend that neither case applies for three reasons: (1) plaintiffs in those cases "were not deceived or misled by false representations," in purported contrast to the Plaintiffs here [Opp. at 13:17-18]; (2) *Gabriel* and *Skinner* involved pensions, not payor-provider disputes [Opp. at 14:4-16]; and (3) estoppel was not appropriate in those cases because it would have conferred on the plaintiffs a "windfall" benefit, whereas Plaintiffs here do not seek such a benefit [Opp. at 14:17-15:5.]. Each distinction is unpersuasive.

a. Plaintiffs Fail To Plead The Elements Of Equitable Estoppel and Reformation Under *Gabriel* and *Skinner*.

First, the *Gabriel* court rejected the plaintiff's estoppel claim on two independent grounds: (1) estoppel could not be used to "enlarge his rights… beyond what he could recover under the unambiguous language of the plan itself," 773 F.3d at 959 (internal quotes omitted); and (2) the plaintiff was aware that the plan representative provided erroneous information about the plan terms. *Id*. at 961 ("***Even if*** Gabriel could show that the Plan was ambiguous, he fails to satisfy ***another*** element necessary to qualify for equitable estoppel: that he was ignorant of the true facts.") (emphasis added). The lack of deception was only an alternate ground that the Ninth Circuit relied on in dismissing the estoppel claim. Contrary to Plaintiffs' assertion, the Ninth Circuit's main reason for dismissal – that estoppel may not contradict the literal terms of a benefits plan – was not dicta. [*See* Opp. at 14, n.7.] *Skinner* analyzed the separate issue of reformation. 673 F.3d at 1166-67. The *Skinner* plaintiffs' reformation claim failed because they "presented no evidence that [the benefits plan] contains terms that ***were induced*** by fraud, duress, or undue influence." *Id*. at 1166 (emphasis added). While Plaintiffs correctly note that the *Skinner* plaintiffs were "not deceived or misled by false representations" [Opp. at 13:17-18], this only confirms the fatal defect of their reformation claim. Like the *Skinner* plaintiffs, Plaintiffs here never allege that they (or their patients) were

fraudulently ***induced*** to assent to a contract. [SAC ¶ 287.]

b. <u>If They Are Assignees, Plaintiffs Do Not Enjoy Rights Broader Than That Of Their Assignors.</u>

Second, Plaintiffs assert that *Gabriel* and *Skinner* are distinguishable because they are pension cases. Assignments of benefits are not allowed in the pension context. [Opp. at 14:4-5 (citing 29 U.S.C. § 1056(d)(1)).] According to Plaintiffs, because they are assignees and not beneficiaries, they "lacked access to the underlying plan" in contrast to the pension beneficiaries in *Gabriel* and *Skinner*. [Opp. at 14:5-16.] Plaintiffs therefore argue that their inability to access these documents left them "uniquely vulnerable," which entitles them to ERISA's equitable remedies. [*Id*.] This argument fails. Under Plaintiffs' reasoning, their alleged ignorance of the AAPs would entitle them to equitable relief, even if their assignor-patients lack the ability to bring these claims (because they do have access to the plan documents). Plaintiffs cite no cases in the payor-provider context where an assignment of benefits may confer more rights on the assignee than the assignor. Plaintiffs' rights pursuant to the assignment, if any, would be at most coextensive with that of their assignor-patients.[8] The presence of assignments does not enable Plaintiffs to seek equitable relief, and Plaintiffs' contention that they should be entitled to greater or different rights than the patient-assignors is untenable.

c. <u>The Supposed Absence Of "Windfall" Benefits Does Not Warrant Equitable Remedies.</u>

Third, Plaintiffs' suggestion that *Gabriel* and *Skinner* denied equitable relief because the plaintiffs would have received a "windfall" benefit is misleading. [Opp. at 14:17-18.] While receiving a "windfall" benefit in contravention of literal plan terms may be a sufficient condition to preclude estoppel, it is not a necessary one. The rule is that estoppel may not be used to vary the written terms of a benefits plan. *See, e.g.*,

[8] *See, e.g., Misic v. Building Serv. Emps. Health & Welfare Tr.*, 789 F.2d 1374, 1378 n.4 (9th Cir. 1986) (noting "familiar principle that an assignment cannot create rights in the assignee not held by the assignor").

Renfro, 686 F.3d at 1054. Thus, prohibiting "windfall" benefits – those in excess of what is provided for in plan documents – would be a logical application of that principle. *See, e.g.*, *Greany*, 973 F.2d at 822 (denying estoppel claim because it would "enlarge [plaintiff's] rights against the plan ***beyond what he could recover under the unambiguous language of the plan itself***.") (emphasis added). Indeed, the *Gabriel* plaintiff's estoppel claim failed precisely because he sought to contradict the plain terms of the benefits plan by trying to receive pension payments to which he was not entitled. 773 F.3d at 959. Likewise, precluding the enforcement of valid AAPs would be an impermissible use of estoppel, as it too would contravene the unambiguous written terms of a benefits plan: benefits are not assignable. Whether Plaintiffs may receive a "windfall" benefit is irrelevant in dismissing their estoppel claim. The presence of a "windfall" benefit is immaterial to the analysis of reformation as well. The *Gabriel* plaintiff's reformation claim (based on fraud) failed because there was no improper inducement. 773 F.3d at 962. Similarly, the *Skinner* plaintiffs' reformation claim (based on fraud) failed because the benefits plan was not induced by fraud, duress, or undue influence. 673 F.3d at 1167.

Gabriel and *Skinner*, both binding, post-*Amara* precedent, establish pleading requirements that the SAC fails to satisfy. Plaintiffs may not use estoppel to contradict the terms of the AAP, nor can they reform the plans when there was no fraud in the inducement of assent to the plans.

5. Form A Does Not Assign Equitable Claims To Plaintiffs.

Plaintiffs' argument that Form A assigns claims for equitable relief to Plaintiffs is contrary to well-settled case law and this Court's Omnibus Order. As this Court previously ruled, Form A "manifests an intent to assign a claim for benefits and the right to sue for them under ERISA," but that such an assignment "***is limited on its face to the amount due for treatment and services rendered by Dual Diagnosis***." [Order at 8 (emphasis added).][9]

[9] Plaintiffs attempt to blur the distinction between a § 502(a)(1)(B) claim and one under §

DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc., 852 F.3d 868 (9th Cir. 2017) is illustrative. There, the Ninth Circuit held that an authorization of direct payment—which is what Plaintiffs have alleged here—does not assign claims for equitable relief. *Id*. at 876-77. In so ruling, the Ninth Circuit reasoned that "[t]he assignment language refers only to direct payment of insurance benefits to the physician, with no reference to any broader rights" and held that the assignee-plaintiff could not bring a claim under either § 502(a)(1)(B) or § 502(a)(3) for injunctive and declaratory relief. *Id*. at 877-78. *DB Healthcare* thus forecloses Plaintiffs' argument that Form A somehow authorizes Plaintiffs to pursue equitable claims under ERISA even though it neither mentions nor manifests any intention by Plaintiffs' patients to assign claims for equitable relief . Notably, the Opposition does not cite to any decision where a mere assignment of benefits was construed as assigning claims for equitable relief. The reason is simple: no such cases exist.

D. Plaintiffs' Third Claim For Alleged Violations Of Business And Professions Code § 17200 Fails To Plead Unlawful, Fraudulent, Or Unfair Conduct.

Plaintiffs contend that ERISA does not preempt their UCL claim. [Opp. at 20-21.] Plaintiffs furthermore argue that their claim under the UCL is sufficiently pleaded to

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502(a)(3). [Opp. at 6:1-8.] A claim under § 502 (a)(1)(B) ***enforces*** the terms of a benefits plan; it does not change them. *See Amara*, 563 U.S. at 435-36. By contrast, equitable relief such as reformation and estoppel necessarily changes the benefits plan by either redrafting its terms or precluding enforcement of certain provisions such as an AAP. [Omnibus MTD at 9:24-28.] *Amara* does not alter the sharp distinction between § 502(a)(1)(B) and § 502(a)(3) claims. In particular, Plaintiffs have failed to address post-*Amara* case law which explicitly holds that equitable relief is "*not* available as a remedy pursuant to 502(a)(1)(B)." *See Bush*, 77 F. Supp. 3d at 908. Therefore, to seek reformation and estoppel, Plaintiffs must resort to § 502(a)(3). However, a claim under § 502(a)(3) is only available where equitable relief is expressly and knowingly assigned. *See Sanctuary Surgical Ctr., Inc. v. Aetna, Inc.*, 546 F. App'x 846, 851-52 (11th Cir. 2013) (holding that "the scope of an assignment cannot exceed the terms of the assignment agreement itself" and rejecting a health care provider's claim that an assignment of the right to receive insurance benefits carries with it the ability to bring a claim for equitable relief); *Almont Ambulatory Surgery Ctr. v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1130 (C.D. Cal. 2015) (holding than an assignment of "all rights and benefits under my contract with my INSURANCE COMPANY" does not manifest an intent to assign claims for equitable relief); *In re WellPoint, Inc. Out-Of-Network "UCR" Rates Litig.*, 903 F. Supp. 2d 880, 895 (C.D. Cal. 2012) (holding that an assignment that "expressly relate[s] to the right to receive benefits" does not confer standing on a provider to bring equitable claims).

include both "unfair" and "unlawful" conduct.[10] [*See* Opp. at 18-20.] Plaintiffs are incorrect on all counts.

1. Plaintiffs' UCL Claim Is Preempted By ERISA.

Plaintiffs cannot escape ERISA preemption of their § 17200 claim. In an effort to save this claim, Plaintiffs distance themselves from their self-identification as assignees of their patients. However, the crux of Plaintiffs' § 17200 claim (as well as the entire SAC) is that Defendants allegedly unlawfully paid ERISA plan benefits to Plaintiffs' patients, rather than Plaintiffs directly under an alleged assignment of benefits. [SAC ¶¶ 5, 256, 263, 295-97.] The SAC expressly seeks the recovery of those ERISA plan benefits – even where the underlying ERISA benefit plans contain AAPs. [*Id*. at ¶¶ 285-289.] The practical effect of Plaintiffs' theory of recovery – which is predicated on alleged "misrepresentations" by Defendants – is that valid and enforceable AAPs in the ERISA benefit plans should be excised and ERISA benefits should be paid directly to Plaintiffs under an assignment of ERISA plan benefits.[11] [*Id*.] Consequently, Plaintiffs' § 17200 claim clearly falls within the preemptive scope of ERISA's express preemption provision, and it should be dismissed with prejudice.

2. The SAC Fails To Plead An "Unfair" Claim.

The SAC also fails under the "unfair" prong of the statute. Plaintiffs cannot meet

[10] Plaintiffs do not contend that the "fraudulent" prong of the UCL is a basis for their claim. [Opp. at 17:22 ("Sovereign is a victim of Defendants' unfair and unlawful conduct.").]

[11] In response, Plaintiffs rely on cases that are readily distinguishable. Plaintiffs' citation to cases where a third-party claims administrator erroneously represented to a health care provider that the patients were covered under ERISA plans when they were not are inapplicable here. Indeed, these decisions held that ERISA did not preempt the provider's state law claims "***precisely because there is no ERISA plan coverage***" in the first instance. *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 246 (5th Cir. 1990) (emphasis added); *see also Hospice of Metro Denver, Inc. v. Group Health Ins., Inc.*, 944 F.2d 752 (10th Cir. 1991) (citing *Memorial Hosp. Sys.*, 904 F.2d at 246); *The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1010 (9th Cir. 1995) (citing to beneficiaries' lack of existing coverage). In contrast, Plaintiffs' patients in this case are all alleged to be covered as participants or beneficiaries of employer-sponsored benefit plans. [SAC ¶¶ 19-20.] Further, none of the cases cited by Plaintiffs considered whether ERISA preempted a claim that sought to excise the existence of an AAP. *See, e.g., Hoag Memorial Hosp. v. Managed Care Adm'rs*, 820 F. Supp. 1232, 1233-34, 1237 (C.D. Cal. 1993) (distinguishing Fifth Circuit precedent on the grounds that the cited case involved an "anti-assignment clause in the plan").

the *Cel-Tech* test requiring allegations of conduct violating antitrust and competition principles. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). The SAC simply does not support Plaintiffs' contention that Defendants acted unfairly under § 17200, and the Opposition Brief does not contend otherwise.

Plaintiff also cannot avoid the fact that, as non-consumers and non-competitors to Defendants, Plaintiffs lack standing to state a claim under the unfairness prong of § 17200. *See Ctr. for Neuro Skills v. Blue Cross of Cal.*, No. 1:13-cv-00743-LJO-JLT, 2013 WL 5670889, at *9 (E.D. Cal. Oct. 15, 2013) (dismissing provider-assignee's UCL claim against the payor); *Almasi v. Equilon Enters., LLC*, No. 5:10-cv-03458 EJD, 2012 WL 3945528, at *9-10 (N.D. Cal. Sept. 10, 2012). Indeed, in opposition, Plaintiffs rely upon cases that do not directly discuss the issue of standing under the unfairness prong of § 17200 and are therefore unavailing. *See Coast Plaza Doctors Hosp. v. UHP Healthcare*, 105 Cal. App. 4th 693, 704-05 (2002) (no direct discussion of standing under the unfair prong of § 17200); *Bell v. Blue Cross of Cal.*, 131 Cal. App. 4th 211, 217-218 (2005) (discussing standing under the unlawful, not the unfair, prong of § 17200).

3. Plaintiffs May Not Use The Opposition Briefing To Revise Their "Unlawful" Claim.

As this Court explained, to state a violation of "unlawful" conduct under the UCL, Plaintiffs were required to identify a "particular section of a statutory scheme and describe with reasonable particularity the facts supporting the statutory elements of the alleged violation." [Order at 20:1-30.] For the second time, Plaintiffs have failed to do so, alleging only a "prohibition against systematically misleading and deceiving an innocent counterparty." [SAC ¶ 305.] Plaintiffs' Opposition attempts to remedy this defective pleading by now claiming that the SAC meant to allege "negligent misrepresentation, constructive fraud, and fraud" as the bases of its "unlawful" UCL claim. That is an improper use of the opposition briefing. *See* Fed. R. Civ. Pro. 15(a)(2). Plaintiffs' "unlawful" claim under the UCL should therefore be dismissed.

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E. Plaintiffs' Allegations For Their Fourth Claim Asserting State Law Violations Are Deficient.

1. Plaintiffs' Attempt To Use Their Opposition Briefing To Amend The SAC Demonstrates The Vagueness Of Their Allegations

Rule 8 requires giving a defendant "fair notice of what the … claim is and the grounds upon which it rests," "labels and conclusions … will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In violation of Rule 8, Plaintiffs seek "all permissible relief under state law" without identifying what claims they are asserting and what facts underlie this "permissible relief." [SAC ¶ 316.] Remarkably, Plaintiffs do not dispute that their "other state law" claim is a bare legal label that fails to give Defendants any notice of the claims at issue. [*See* Omnibus MTD 23:28-24:6; SAC, p. 67:18.]

Plaintiffs nonetheless assert broadly that the SAC pleads sufficient facts to withstand the pending motion to dismiss. [Opp. at 22:1-8.] Through their Opposition briefing, Plaintiffs attempt to amend the infirmities of the SAC's Fourth Claim by now listing their state law claims for relief: reformation, intentional misrepresentation, negligent misrepresentation, promissory estoppel, and breach of contract. [*See* Opp. at 22:9-23:4.] That is not an appropriate use of an opposition. *See* Fed. R. Civ. P. 15(a)(2). For example, the SAC explicitly cites to the California Evidence Code in an attempt to use equitable estoppel as a cause of action, even though equitable estoppel is not an independent cause of action. *Moncada v. West Coast Quartz Corp.*, 221 Cal. App. 4th 768, 782 (2013); [SAC ¶ 312.]. Plaintiffs now contend that they meant to say promissory estoppel, an entirely distinct claim. [Opp. at 22:13-14.] In any event, Plaintiffs' SAC does not adequately plead the factual allegations supporting a new promissory estoppel claim, again failing to apprise Defendants of "sufficient factual matter" underpinning Plaintiffs' claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[12]

[12] Plaintiffs' new promissory estoppel claim fails as a matter of law for at least two independent reasons. First, promissory estoppel only applies if an alleged agreement is unenforceable for lack of consideration. *See Barroso v. Ocwen Loan Servicing, LLC*, 208 Cal. App. 4th 1001, 1016 (2012). There is simply no allegation in the SAC that a particular agreement was unenforceable for lack of consideration. Second, the SAC does not allege a "promise clear and unambiguous in its terms," which is a necessary element of a promissory estoppel claim." *US Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 901

In another instance, Plaintiffs contend that "fairly read, Claim IV properly alleges state law negligent misrepresentation claims against even *ERISA* plans (and their associated Blues)" [Opp. at 23:5-6]; by contrast, the Fourth Claim in the SAC asserts state law claims "Against ***Non***-ERISA Plan Defendants and the Associated Blue Cross Defendants." [SAC, p. 67:19-20 (emphasis added).[13]] Plaintiffs' improper eleventh hour re-characterization of the SAC's allegations reflects new theories of liability and new defendants, and confirms that the Fourth Claim fails to satisfy Rule 8's fair notice requirement.

2. Plaintiffs' Claims For Misrepresentation, Reformation, and Breach of Contract Fail.

As noted, *supra*, Plaintiffs' claims for negligent and intentional misrepresentation fail for lack of particularity under Rule 9(b) and for reasons identified in the Omnibus Motion to Dismiss that Plaintiffs fail to rebut. [Omnibus MTD at 24:8-28.] In short, the SAC's allegations fail to identify the "specific content" of any purported fraud. *See Swartz*, 476 F.3d at 764. As a result, Plaintiffs' intentional and negligent misrepresentation claims and reformation claim fail under Rule 9(b). The reformation claim fails for the additional reason that it does not plead fraudulent inducement of assent, or mistake between Defendants and their patients. *See Philips Med. Capital, LLC v. Med. Insights Diagnostics Ctr., Inc.*, 471 F. Supp. 2d 1035, 1047 (N.D. Cal. 2007). The SAC never alleges that the AAPs between Defendants and Patients failed to express their intentions, or that Defendants somehow fraudulently induced Patients into agreeing to the AAPs. [*See* SAC ¶ 313.] Finally, the SAC does not plead a contract between Plaintiffs and Defendants, or the breach of such contract. [*See* Omnibus MTD at 23:14-26.] The SAC only alleges a contract between Defendants and Plaintiffs' patients. [SAC ¶ 308.] Therefore, Plaintiffs' Fourth Claim should be dismissed with prejudice.

(2005). As noted in Section II.B., *supra*, Plaintiffs have failed to plead with particularity the content of Defendants' supposed communications with Plaintiffs.

[13] The Opposition then reconfirms the limited scope of this claim. [Opp. at 21:24-25 ("Claim IV of the SAC seeks relief under state law with respect to those plans not covered by ERISA.").]

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant Defendants' Omnibus Motion to Dismiss Plaintiffs' SAC in its entirety with prejudice.

DATED: May 30, 2017

FOLEY & LARDNER LLP
Eileen R. Ridley
Michael A. Naranjo
Alan R. Ouellette

/s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Defendants BLUE CROSS OF CALIFORNIA, dba ANTHEM BLUE CROSS, ANTHEM HEALTH PLANS, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD, ANTHEM HEALTH PLANS OF KENTUCKY, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD, ANTHEM INSURANCE COMPANIES, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD, COMMUNITY INSURANCE COMPANY, dba ANTHEM BLUE CROSS AND BLUE SHIELD, EMPIRE HEALTH CHOICE ASSURANCE, INC., dba EMPIRE BLUE CROSS AND BLUE SHIELD, ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD, ANTHEM HEALTH PLANS OF VIRGINIA, INC., BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., BLUE CROSS BLUE SHIELD OF WISCONSIN, erroneously sued as THE ANTHEM COMPANIES, INC., ACWA/JPIA EMPLOYEE BENEFITS PROGRAM, AMERIFLIGHT, LLC GROUP LIFE & HEALTH INSURANCE PLAN, BANK OF THE WEST EMPLOYEE BENEFIT PLAN, BLOOMBERG L.P. HEALTH AND WELFARE PLAN, CNS HEALTH AND WELFARE BENEFITS PLAN, EATON CORPORATION MEDICAL PLAN FOR U.S. EMPLOYEES, EINSTEIN NOAH RESTAURANT GROUP, INC. EMPLOYEE BENEFIT PLAN, ERNST & YOUNG MEDICAL PLAN, FERGUSON ENTERPRISES INC. FLEXIBLE BENEFITS PLAN, FOLLETT CORPORATION

WELFARE BENEFIT PLAN, erroneously sued as FOLLETT CORPORATION EMPLOYEES BENEFIT TRUST, GENTIVA HEALTH SERVICES HEALTH & WELFARE PLAN, GLOBECAST HEALTH AND WELFARE BENEFITS PLAN, HOME DEPOT MEDICAL AND DENTAL PLAN, erroneously sued as HOME DEPOT WELFARE BENEFITS PLAN, INTEL CORPORATION HEALTH AND WELFARE BENEFIT PLAN, INTEVAC LIFE AND WELFARE PLAN, KENTUCKY CONSTRUCTION INDUSTRY TRUST, LECROY HEALTH AND DISABILITY BENEFIT PLAN, LIVE NATION ENTERTAINMENT, INC. GROUP BENEFITS PLAN, NORTHROP GRUMMAN CORPORATION GROUP BENEFITS PLAN, PEAK FINANCE COMPANY GROUP HEALTH PLAN, PEPSICO EMPLOYEE HEALTH CARE PROGRAM, SAGE SOFTWARE INC. AND CO-SPONSORING AFFILIATES HEALTH AND WELFARE PLAN, SALLIE MAE EMPLOYEES COMPREHENSIVE WELFARE BENEFITS PLAN, SHEET METAL WORKERS LOCAL NO. 40 HEALTH FUND, THE AEROSPACE CORPORATION GROUP HOSPITAL-MEDICAL PLAN, THE KROGER CO. HEALTH & WELFARE BENEFIT PLAN, THE LILLY EMPLOYEE WELFARE PLAN, THE LINCOLN ELECTRIC COMPANY WELFARE BENEFITS PLAN, THE STEAK N SHAKE EMPLOYEE BENEFIT PLAN, VERIZON NATIONAL PPO WEST, VIASAT INC. EMPLOYEE BENEFIT PLAN and XEROX CORPORATION WELFARE PLAN

DATED: May 30, 2017

GORDON AND REES LLP
Ronald K. Alberts
Jennifer Marks Ghozland
Shannon Ernster

/s/ Ronald K. Alberts
Ronald K. Alberts
Attorneys for Defendants ALLTECH, INC. BENEFIT PLAN and EHEALTHINSURANCE SERVICES INC.

DATED: May 30, 2017

VON BEHREN AND HUNTER LLP
William E. von Behren
Carol B. Lewis
Joann V. Lee

/s/ William E. von Behren
William E. von Behren
Attorneys for Defendants ALASKA AIR GROUP, INC. WELFARE BENEFIT PLAN, ASANTE EMPLOYEE BENEFITS PLAN, BLUE CROSS BLUE SHIELD OF TENNESSEE, INC., BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC. d/b/a FLORIDA BLUE, BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS HMO BLUE, INC., BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC., BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA, BLUE CROSS OF NORTHEASTERN PENNSYLVANIA, C.R. BARD, INC. EMPLOYEE BENEFIT PLAN, CALIFORNIA PHYSICIANS SERVICE d/b/a BLUE SHIELD OF CALIFORNIA, CHICOS FAS, INC. HEALTH & WELFARE BENEFIT PLAN, COMMUNITY HEALTH SYSTEMS HEALTH PLAN, COVANCE, INC. HEALTH & WELFARE PLAN, DYCOM INDUSTRIES HEALTH AND WELFARE PLAN, EXCELLUS HEALTH PLAN, INC., F.N.B. CORPORATION HEALTH AND WELFARE PLAN, F5 NETWORKS, INC.

EMPLOYEE BENEFIT PLAN, FASTRAC MARKETS LLC EMPLOYEE WELFARE BENEFIT PLAN, FRESENIUS MEDICAL CARE NORTH AMERICA MEDICAL PLAN, erroneously sued as NATIONAL MEDICAL CARE, INC. GROUP MEDICAL, DENTAL, LIFE AND AD&D PLAN, GKN EMPLOYEE WELFARE BENEFIT PLAN, GENERAL NUTRITION GROUP INSURANCE PLAN, GLOBYS, INC. GROUP HEALTH PLAN, HIGHMARK BCBSD, INC., HIGHMARK BLUE CROSS BLUE SHIELD, HIGHMARK BLUE SHIELD, HIGHMARK, INC. d/b/a HIGHMARK BLUE SHIELD, HORIZON HEALTHCARE SERVICES, INC. d/b/a HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, INLANDBOATMENS UNION OF THE PACIFIC NATIONAL HEALTH BENEFIT TRUST, INTERRAIL SIGNALS, INC. WELFARE BENEFIT PLAN, JENNINGS AMERICAN LEGION HOSPITAL EMPLOYEE BENEFIT PLAN, LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY BLUE CROSS AND BLUE SHIELD OF LOUISIANA, MACHINISTS HEALTH & WELFARE TRUST FUND, MARTIN MARIETTA MEDICAL PLAN, NATURES PATH FOODS, INC. WELFARE BENEFIT PLAN, NORTHERN CALIFORNIA SHEET METAL WORKERS, NOVARTIS CORPORATION WELFARE BENEFIT PLAN, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C. GROUP MEDICAL PLAN, ORASURE TECHNOLOGIES INC. HEALTH AND WELFARE PLAN, PEAK 10, INC. EMPLOYEE BENEFIT PLAN, PREMERA BLUE CROSS, PREMERA BLUE CROSS BLUE SHIELD OF ALASKA, PROFIT INSIGHT HOLDINGS LLC GROUP HEALTH PLAN, PUBLIX SUPER MARKETS, INC. GROUP HEALTH BENEFIT PLAN, PUGET SOUND PILOTS GROUP HEALTH PLAN, RAYONIER, INC. WELFARE PLANS, REGENCE BLUECROSS BLUESHIELD OF OREGON, erroneously sued herein as REGENCE INSURANCE HOLDING CORPORATION; REGENCE BLUECROSS BLUESHIELD OF UTAH, erroneously sued herein as REGENCE INSURANCE HOLDING CORPORATION; REGENCE

BLUESHIELD erroneously sued herein as REGENCE INSURANCE HOLDING CORPORATION; SAS INSTITUTE INC. WELFARE BENEFITS PLAN, SCANA CORPORATION HEALTH & WELFARE PLAN, SEABRIGHT INSURANCE COMPANY GROUP HEALTH PLAN, SPOKANE TEACHERS CREDIT UNION EMPLOYEE MEDICAL & DENTAL PLAN, TUV AMERICA, INC. INSURANCE BENEFITS PLAN, THE MASTER BUILDERS ASSOCIATION HEALTH INSURANCE TRUST, TRINET EMPLOYEE BENEFIT INSURANCE PLAN, UNITED STATES STEEL PLAN FOR ACTIVE EMPLOYEE INSURANCE BENEFITS, U.S. RENAL CARE, INC., WELLMARK OF SOUTH DAKOTA, INC. and WELLMARK, INC.

DATED: May 30, 2017

REED SMITH LLP
Dan J. Hofmeister, Jr.
Amir Shlesinger
Monica J. Zi

/s/ Dan J. Hofmeister, Jr.
Dan J. Hofmeister, Jr.
Attorneys for Defendants 3M EMPLOYEES' WELFARE BENEFITS ASSOCIATION (TRUST II) PLAN, BCBSM, INC. d/b/a BLUE CROSS BLUE SHIELD OF MINNESOTA, BLUE CROSS AND BLUE SHIELD OF KANSAS CITY d/b/a BLUE KC (erroneously sued as "BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, INC.", BLUE CROSS AND BLUE SHIELD OF KANSAS, INC., BLUE CROSS AND BLUE SHIELD OF NEBRASKA, BLUE CROSS OF IDAHO HEALTH SERVICE, INC., CARGILL INCORPORATED & PARTICIPATING AFFILIATES GROUP HEALTH PLAN, CONSTRUCTION INDUSTRY LABORERS WELFARE FUND, EMPLOYEES' BENEFIT PLAN OF GENERAL MILLS, INC., WALTER INVESTMENT MANAGEMENT CORP. COMPREHENSIVE WELFARE BENEFIT PLAN (formerly known as GREEN TREE COMPREHENSIVE WELFARE PLAN),

HDR, INC. GROUP INSURANCE PLAN, J.R. SIMPLOT COMPANY GROUP HEALTH & WELFARE PLAN, ALBERTSON'S LLC HEALTH & WELFARE BENEFIT PLAN, LAYNE CHRISTENSEN COMPANY HEALTH AND WELFARE PLAN, MDU RESOURCES GROUP, INC. HEALTH AND WELFARE BENEFITS PROGRAM, MEDTRONIC, INC. GROUP INSURANCE PLAN, METAL-MATIC, INC. WELFARE BENEFIT PLAN, ST. LUKES LUTHERAN CARE CENTER EMPLOYEE HEALTH CARE PLAN, TRANSPORT CORPORATION OF AMERICA, INC. EMPLOYEE HEALTH AND WELFARE BENEFIT PLAN, TWIN CITIES BAKERY DRIVERS HEALTH & WELFARE FUND and UNIVERSITY OF NEBRASKA FOUNDATION

DATED: May 30, 2017

O'MELVENY AND MYERS LLP
Brian D. Boyle
Matthew W. Close
Raymond Collins Kilgore

/s/ Brian D. Boyle
Brian D. Boyle
Attorneys for Defendants ACTIVE POWER, INC. HEALTH AND WELFARE PLAN, ARDENT HEALTH SERVICES WELFARE BENEFIT PLAN, BAXTER INTERNATIONAL INC. AND SUBSIDIARIES WELFARE BENEFIT PLAN, CONSOLIDATED GRAPHICS, INC. GROUP BENEFITS PLAN, DELTA KAPPA GAMMA SOCIETY INTERNATIONAL HEALTH BENEFIT PLAN, DIRT FREE FLOOD SERVICES INC. HEALTH BENEFIT PLAN, ELLIOTT ELECTRIC SUPPLY, L.P. HEALTH BENEFIT PLAN, ENSCO HEALTH PLAN, GROUP HEALTH & WELFARE BENEFITS PLAN OF AMERICAN EAGLE AIRLINES, INC. & ITS AFFILIATES, H.E. BUTT GROCERY COMPANY WELFARE

BENEFIT PLAN, HEALTH CARE SERVICE CORPORATION, A MUTUAL LEGAL RESERVE COMPANY d/b/a BLUECROSS BLUESHIELD OF ILLINOIS, BLUECROSS BLUESHIELD OF MONTANA, BLUECROSS BLUESHIELD OF NEW MEXICO, BLUECROSS BLUESHIELD OF OKLAHOMA, and/or BLUECROSS BLUESHIELD OF TEXAS, IESI CORPORATION EMPLOYEE WELFARE BENEFITS PLAN, ION GEOPHYSICAL CORPORATION GROUP HEALTH PLAN, PIONEER ENERGY SERVICES CORP. GROUP HEALTH PLAN, RANDALL S. FUDGE P.C. EMPLOYEE BENEFITS PLAN, SOUTHWEST SHIPYARD, L.P. CAFETERIA PLAN, TENET EMPLOYEE BENEFIT PLAN, THE GROUP LIFE AND HEALTH BENEFITS PLAN FOR EMPLOYEES OF PARTICIPATING AMR CORPORATION SUBSIDIARIES, UNITED SURGICAL PARTNERS, INTL WELFARE BENEFIT PLAN and XEROX BUSINESS SERVICES, LLC FUNDED WELFARE BENEFIT PLAN

DATED: May 30, 2017

/s/ Patrick P. de Gravelles
Patrick P. de Gravelles
Attorneys for Defendants CAREFIRST OF MARYLAND, INC. d/b/a CAREFIRST BLUECROSS BLUESHIELD and GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC. d/b/a CAREFIRST BLUECROSS BLUESHIELD

DATED: May 30, 2017

MORGAN LEWIS AND BOCKIUS LLP
Nicole A. Diller
Donald L. Havermann
Emily A. Glunz
Anna Kim

/s/ Nicole A. Diller
Nicole A. Diller
Attorneys for Defendants GEICO CORPORATION CONSOLIDATED WELFARE BENEFITS PROGRAM, BIMBO BAKERIES USA HEALTH AND WELFARE PLAN and OWENS-ILLINOIS, INC. HOURLY EMPLOYEES WELFARE BENEFIT PLAN FOR ACTIVE EMPLOYEES

DATED: May 30, 2017

NEIL J. BARKER APC
Neil J. Barker

/s/ Neil J. Barker
Neil J. Barker
Attorneys for Defendants BLUE CROSS BLUE SHIELD OF MICHIGAN, BLUE CROSS AND BLUE SHIELD OF ALABAMA, MUELLER WATER PRODUCTS, INC. FLEXIBLE BENEFITS PLAN, TAC MANUFACTURING, INC. EMPLOYEE WELFARE BENEFIT PLAN and USUI INTERNATIONAL GROUP HEALTH & WELFARE PLAN

DATED: May 30, 2017

LAW OFFICES OF RONALD S. KRAVITZ
Ronald S. Kravitz

/s/ Ronald S. Kravitz
Ronald S. Kravitz
Attorneys for Defendants HUNTINGTON BANCSHARES INCORPORATED HEALTH CARE PLAN and WELLS FARGO & CO. HEALTH PLAN

DATED: May 30, 2017

BENESCH FRIEDLANDER COPLAN & ARONOFF LLP
Maynard A. Buck
Christopher J. Lalak

/s/ Maynard A. Buck
Maynard A. Buck
Attorneys for Defendant EATON CORPORATION MEDICAL PLAN FOR U.S. EMPLOYEES

DATED: May 30, 2017

HUNTON AND WILLIAMS LLP
Phillip J. Eskenazi
Alexandrea H .Young

/s/ Alexandrea H. Young
Alexandrea H .Young
Attorneys for Defendant L BRANDS, INC. HEALTH AND WELFARE BENEFITS PLAN (formerly known and sued as Limited Brands, Inc. Health and Welfare Benefits Plan)

DATED: May 30, 2017

BRYAN CAVE LLP
William B. Brockman
Christopher L. Dueringer
Nancy Franco

/s/ William B. Brockman
William B. Brockman
Attorneys for Defendant MEDIANEWS GROUP WELFARE BENEFITS PLAN

DATED: May 30, 2017

GOODWIN PROCTER LLP
Molly K. Madden
Hong-An Vu

/s/ Molly K. Madden
Molly K. Madden
Attorneys for Defendant VERTICAL SEARCH WORKS, INC. MEDICAL PLAN

DATED: May 30, 2017

BROWNE GEORGE ROSS LLP
Eric M. George
Keith J. Wesley

/s/ Eric M. George
Eric M. George
Attorneys for Defendant WEBMD HEALTH & WELFARE PLAN

DATED: May 30, 2017

BINGHAM GREENEBAUM DOLL LLP
Janet P. Jakubowicz (*Pro Hac Vice*)

NOSSAMAN LLP
James H. Vorhis
Jill N. Jaffe

/s/ Jill N. Jaffe
Jill N. Jaffe
Attorneys for Defendant HL FINANCIAL SERVICES, LLC EMPLOYEE BENEFITS PLAN

DATED: May 30, 2017

MAYNARD COOPER & GALE, LLP
Linda B. Oliver

/s/ Linda B. Oliver
Linda B. Oliver
Attorneys for Defendant THE HARTFORD FIRE INSURANCE COMPANY EMPLOYEE MEDICAL AND DENTAL EXPENSE BENEFITS PLAN

DATED: May 30, 2017

GREENSFELDER, HEMKER & GALE, P.C.
Amy L. Blaisdell
Lauren A. Daming

ROGERS NEMETH GERMAIN PC
Christopher M. Rogers

/s/ Christopher M. Rogers
Christopher M. Rogers
Attorneys for Defendant ASCENSION SMARTHEALTH MEDICAL PLAN

DATED: May 30, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP
Elise D. Klein

/s/ Elise D. Klein
Elise D. Klein
Attorneys for Defendant UFCW LOCAL 555-EMPLOYERS HEALTH TRUST

DATED: May 30, 2017

DECHERT LLP
Nathan McClellan

/s/ Nathan McClellan
Nathan McClellan
Attorneys for Defendant ROCKET SOFTWARE GROUP INSURANCE BENEFIT PLAN

DATED: May 30, 2017

GREENBERG TRAURIG, LLP
Todd Wozniak (*Pro Hac Vice*)
Charles S. Birenbaum

/s/ Todd Wozniak
Todd Wozniak
Attorneys for Defendant BAYHEALTH MEDICAL CENTER, INC. HEALTH AND WELFARE BENEFITS PLAN

Filer's Attestation: Pursuant to Local Rule 5-4.3.4(a)(2)(1), Eileen R. Ridley hereby attests that concurrence in the filing of this document and its contents was obtained from all signatories listed.